

The First Amendment to the United States Constitution states in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Application of the First Amendment has led to a strict separation between Church and State. The question in this case is whether this activity violates the establishment clause of the First Amendment to the United States Constitution, and therefore violates the Code of Judicial Conduct.

Judges are robed, not only as a trapping of power but as a symbol of the judiciary. Robes were used by English Judges for centuries, but black robes were introduced in England in 1694 to commemorate the death of Queen Mary II, the wife of William of Orange. For years the wearing of robes was optional in Wisconsin, but the Wisconsin Supreme Court directed on June 4, 1996 that all judges should wear black robes when on the bench, because the robe's symbolic role needed to be emphasized. Wisconsin Supreme Court Rule 62(1)(e), Standards of Courtesy and Decorum for the Courts of Wisconsin, states "Judges shall wear black robes while presiding on the bench except when exceptional circumstances exist." There is no reference to judicial robes in the Code of Judicial Conduct.

Given these facts, does wearing robes in this religious service violate the establishment clause of the First Amendment to the United States Constitution? The Committee concludes it does not. The "Red Mass" is a once-a-year event where judges of all faiths appear in robes to honor deceased lawyers and judges. The religious service is therefore linked to the profession of law. The robes are worn, on this one occasion, as a sign of respect for those deceased. It in no way, under this specific circumstance, is meant to convey a sense that these judges are endorsing any religious faith.

The Committee concludes the wearing of robes during this religious service does not violate the establishment clause of the First Amendment to the United States Constitution, and therefore the Code of Judicial Conduct.

B. SCR 60.03

SCR 60.03 reads in part:

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

....

- (2) ... A judge may not lend the prestige of judicial office to advance the private interests of the judge or others....

The wearing of robes on this occasion is to honor deceased colleagues, not the church in which the service is being held. It does not lend the "prestige of judicial office" to advance the interests of religion, nor could it be reasonably perceived as an endorsement of religion.

C. SCR 60.05

SCR 60.05 reads in part:

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

- (1) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do none of the following:

....

- (b) Demean the judicial office.

Based upon the previous analysis and comments, the Committee concludes that the wearing of robes under these specific circumstances does not demean the judicial office.

CONCLUSION

The Committee concludes that the wearing of robes by judges at a religious service (a "Red Mass") of a Catholic church to honor the memory of deceased lawyers and judges does not violate either the United States Constitution or the Code of Judicial Conduct.

APPLICABILITY

This opinion is advisory only, is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee, and is limited to questions arising under the Supreme Court Rules, Chapter 60--Code of Judicial Conduct. This opinion is not binding upon the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 98-8 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin, this 21st day of May, 1998.

Thomas H. Barland
Chair